IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs November 18, 2008

STATE OF TENNESSEE v. JAMES JUNIOR BURNS

Appeal from the Criminal Court for Greene County
No. 07CR194 Thomas J. Wright, Judge

No. E2008-01005-CCA-R3-CD - Filed January 21, 2009

The defendant, James Junior Burns, was convicted by a Greene County jury of vandalism and Class D felony evading arrest. The defendant challenges the sufficiency of the convicting evidence on his felony conviction, arguing that no reasonable juror could have concluded that the defendant operated the vehicle that evaded pursuit by the Greene County Sheriff's Department. The defendant also challenges the trial court's allowing the jury to deliberate without the benefit of written instructions in violation of Tennessee Rule of Criminal Procedure 30(c). Lastly, the defendant challenges the sentences and fines imposed upon him. We discern no error in the defendant's convictions or sentence. Although the trial court committed a *de minimus* error in briefly delaying the delivery of written instructions to the jury, such error did not prejudice the defendant. Accordingly, we affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Timothy W. Flohr, Greeneville, Tennessee, for the appellant, James Junior Burns.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth T. Ryan, Assistant Attorney General; C. Berkeley Bell, Jr., District Attorney General; and Cecil Mills, Assistant District Attorney General for the appellee, State of Tennessee.

OPINION

On February 10, 2007, the defendant threw a rock through the windshield of a Ford Contour belonging to Janet Travis while at "The County Line" bar in Greene County, Tennessee. The driver of the car contacted the sheriff's department. A deputy sheriff subsequently encountered the defendant during a traffic stop. The defendant fled from law enforcement officers in his motor vehicle and led the officers in an extended high-speed pursuit.

On July 30, 2007, a Greene County grand jury indicted the defendant on one count of vandalism with damages under $500, *see* T.C.A. § 39-14-408 (2006), one count of evading arrest using a motor vehicle and creating a risk of injury to innocent bystanders, *see id.* § 39-16-603(b)(1), (3), and one count of operating a motor vehicle without a license.[1] The jury, after a trial, found the defendant guilty of vandalism, a Class A misdemeanor, and Class D felony evading arrest. The trial court conducted a sentencing hearing and sentenced the defendant to eight years' imprisonment with the Tennessee Department of Correction at multiple offender status with multiple offender release eligibility (35 percent). Further, the jury assessed fines of $1,000 and $5,000 for the misdemeanor and felony convictions, respectively.

The defendant challenges his convictions on four grounds. First, he challenges the sufficiency of the convicting evidence. Second, he asserts that the trial court erred by verbally instructing the jury regarding a lesser included offense without reducing said instruction to writing before ordering the jury to retire for deliberations in violation of Tennessee Rule of Criminal Procedure 30(c). For his third and fourth grounds, the defendant argues that both his sentence and fines were excessive in light of the proof adduced at trial.

At trial, the State first called Tom Fair, who testified that he observed the defendant throw a rock through the window of a maroon vehicle in the parking lot of The County Line. Mr. Fair went to the bar during the late night/early morning of February 9 and 10, 2007, to meet some friends. He testified that he "doesn't drink" and was sober that evening. He "went outside to start [his] car . . . [and the defendant] was standing there in front of the car that he'd threw the rock through." He observed the defendant holding a rock in his hand "like a pitcher." Mr. Fair stated that he "had a clear line of sight from [his vehicle's] rearview mirror" to the defendant. He said, "I'd seen his arm come up and throw the rock. And I got out of my vehicle and went around, and he was standing in front of the car." Mr. Fair then heard a female "yelling at [the defendant] to get back in the car," and then he saw the defendant get into a car and "sho[o]t off." He described the car in which the defendant left the scene as black with tinted windows. Mr. Fair then returned to the inside of the bar "to find out whose car it belonged to." He found the driver of the car, Beth Johnson, who then called the sheriff's department.

On cross-examination, Mr. Fair testified that the events he recounted occurred after midnight. He explained that he had been introduced to the defendant earlier that evening. He said, "[The defendant] walked up and introduced himself to me." Mr. Fair testified that he had been at the bar for "[a]bout an hour or hour and a half." He stated that the female who yelled at the defendant and left with the defendant had been inside the bar with another male. Mr. Fair stated that the female was in the driver's seat of the black car when he saw her and the defendant leave the parking lot.

Beth Johnson testified that she was driving the vandalized Ford Contour on February 10, 2007. She testified that Janet Travis held the title to the vehicle, but she allowed Ms. Johnson to drive it. Ms. Johnson stated that she drove the vehicle to The County Line, and she discovered

[1] The State dismissed the count of driving without a license prior to trial.

"[a] hole in the windshield of [her] car in the passenger's side" after Mr. Fair informed her of what had happened. She said, after discovering the car had been vandalized, she "got very upset, and . . . called the law." She testified that the damage to the vehicle was less than $500, and she did not give consent to the defendant or anybody else to break the windshield.

On cross-examination, Ms. Johnson could not recount how many drinks she had on the evening of the vandalism, but she admitted that she had been drinking. She recalled that Mr. Fair told her about the damage to the car "a little after midnight." Ms. Johnson remembered that The County Line's management had asked the defendant to leave the bar before the vandalism occurred. When asked whether she knew the defendant, she responded, "I know -- I barely remember [the defendant] from that night. . . . I know of him." She also "knew of" Amy Norton, the woman that left with the defendant in the black car.

Janet Travis, who possessed the title to the Ford Contour, testified that Ms. Johnson was her "ex daughter-in-law" and that she was allowing Ms. Johnson to drive the vehicle on February 9 and 10, 2007. She stated that she did not give anyone permission to damage the vehicle.

Deputy David Beverly of the Greene County Sheriff's Department testified that, in the early morning hours of February 10, 2007, he received a call to respond to the incident at The County Line. He testified that the dispatcher "advised [him] that [the defendant] and Amy Norton were seen in the parking lot and are the suspects in the vandalism and that they had left in a black four-door car with tinted windows headed back toward Greeneville." Deputy Beverly headed toward the bar to intercept the suspect, and he "[saw] the black four-door dark tinted windows car headed [from the direction of the bar at] what appeared to be at a high rate of speed. Not high, high -- greater than the speed limit." He reported the tag number, and "the tags c[a]me back to Amy Norton."

Deputy Beverly testified that, after the vehicle sped up and passed a car, he "decided it was a good time to go ahead and stop it," and he "activated [his] blue lights." The vehicle stopped, and Deputy Beverly used his spotlight and saw "a female's long hair in the front passenger . . . seat." He testified, "I could see a bald-headed skinny male . . . right behind the driver in the back seat. He also could see that the driver was a male with short hair. Deputy Beverly said, "Within me turning my spotlight on, I would say four seconds went by, maybe five, six -- and the vehicle sped off and just took off."

He followed the vehicle with his blue lights, flashers, and siren operating. The defendant drove across parking lots, and he sped through the Greeneville Housing Authority Apartments, where Deputy Beverly testified that he "assume[d] that there's a lot of children." He testified that the defendant's vehicle almost collided with another vehicle on Kingsport Highway. The defendant then drove "completely in the other lane" on the highway, which Deputy Beverly testified was "winding," "hilly," and "curvy." Eventually the vehicle stopped at the defendant's father's house after climbing a long and winding driveway.

Deputy Beverly testified that he tried to cut-off the vehicle at a curve in the driveway, but his cruiser became stuck. He exited his vehicle and started running toward the house. He said,

"I've got about seventy-five yards to go up hill before I get to this trailer. And as I'm closing the gap, I can see . . . the vehicle go up there and stop next to a barbed wire fence." He "[saw] a female and a male get out of the passenger side, run down straight into the back door of the trailer." He described the male as "very skinny" and bald and testified that the male entering the trailer was not the defendant. He later identified the man as Donnie Geurassio. Deputy Beverly followed the two suspects into the trailer and arrested them. During his arrest and search of Ms. Norton, she stated, "There's no stopping [the defendant], he'll whoop your A S S . . . ."

Deputy Beverly testified that he had no doubt in his mind that the defendant was driving the black car. He explained that he had known the defendant and his father for "a while." During his testimony, the State entered into evidence the video of the pursuit from Deputy Beverly's cruiser.

On cross-examination Deputy Beverly stated that he received the call about the vandalism at 3:46 a.m. and that the Greene County Sheriff's Department received the call from The County Line at 3:31 a.m. He also stated that, when he arrested Ms. Norton, she had a car key in her pocket; however, he did not know whether the key was for the black car or another vehicle.

Deputy Robert Livingston of the Greene County Sheriff's Department testified that he was also involved in the pursuit of the defendant. He said, "As the vehicle was making its left-hand turn onto Kingsport Highway, I saw three people in the vehicle." He recognized the backseat passenger as Mr. Geurassio because he had "dealt with" him "many times." Deputy Livingston also recognized Ms. Norton in the front passenger seat of the vehicle because he "also [had] dealt with her many times." He clarified that Ms. Norton was not driving the vehicle. He testified that his view of the driver was obstructed by Ms. Norton; however he testified that the driver had a "short male haircut."

On cross-examination Deputy Livingston stated that he did not remember whether the windows of the vehicle were tinted. He also clarified that he was approximately 10 or 15 feet from the vehicle when he identified the passengers.

The defendant chose not to testify and did not present any proof.

After the close of proof, the trial court instructed the jury. During jury instructions, defense counsel and the State mentioned to the court that the instructions did not include an instruction to consider Class E felony evading arrest as a lesser-included offense of Class D felony evading arrest. The trial court explained to the jury, "I left one out. There's one other lesser included offense. . . . There is also a Class E felony which is the exact same crime, except it omits the last element which is committing the offense placing someone in danger of death or . . . injury to innocent bystanders or third parties." The court then explained, "If you find the defendant not guilty of evading arrest while operating a motor vehicle, then you next need to consider whether he's guilty of the Class E felony of simply evading arrest using a motor vehicle without creating a risk of death or injury to innocent bystanders or third parties." The trial court then stated that it would include the lesser-included offense instruction in written form for the jury. However, the court then stated, "I won't give these [forms] to you until I have all of them. But it would be okay for you all

to begin to deliberate before I give you your copy of the charge and before I give you these verdict forms."

Based on the evidence as summarized above, the jury returned verdicts of guilty on the counts of vandalism under $500 and Class D felony evading arrest with a motor vehicle. The jury also assessed a $1,000 fine for the vandalism conviction and a $5,000 fine for the evading arrest conviction.

I. Sufficiency of the Evidence

The defendant challenges the sufficiency of the convicting evidence for his evading arrest conviction, stating that "the trial [court] erred in overruling [his] Motion for Judgment of Acquittal because the [S]tate offered no evidence upon which a reasonable jury could find [the defendant] to be the driver of the pursued vehicle on the night in question." The defendant does not challenge his vandalism conviction.

The standard by which the trial court determines a motion for judgment of acquittal is, in essence, the same standard which applies on appeal in determining the sufficiency of the evidence after a conviction. *State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998); *State v. Anderson*, 880 S.W.2d 720, 726 (Tenn. Crim. App. 1994). That is, "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *see* Tenn. R. App. P. 13(e).

Of critical importance in the present case, this court, in determining the sufficiency of the evidence, should not reweigh or reevaluate the evidence, *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990), and questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not the appellate court, *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Also, this court may not substitute its inferences for those drawn by the trier of fact from the evidence. *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956); *Farmer v. State*, 574 S.W.2d 49, 51 (Tenn. Crim. App. 1978). On the contrary, this court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Cabbage*, 571 S.W.2d at 835.

Moreover, a criminal offense may be established exclusively by circumstantial evidence, *Duchac v. State*, 505 S.W.2d 237 (Tenn. 1973); *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003); however, before an accused may be convicted of a criminal offense based upon circumstantial evidence alone, the facts and circumstances "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." *State v. Crawford*, 470 S.W.2d 610, 612 (Tenn. 1971). "In other words, '[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt.'" *State v. McAfee*, 737 S.W.2d 304, 306 (Tenn. Crim. App. 1987) (quoting *Crawford*, 470 S.W.2d at 613).

Tennessee Code Annotated section 39-16-603 provides, in relevant part, that "it is unlawful for any person, while operating a motor vehicle on any street, road, alley or highway in this state, to intentionally flee or attempt to elude any law enforcement officer, after having received any signal from such officer to bring the vehicle to a stop." T.C.A. § 39-16-603(b)(1). If "the attempt to elude creates a risk of death or injury to innocent bystanders or other third parties . . . a violation [of this statute] is a Class D felony." *Id.* § 39-16-603(b)(3).

The defendant only challenges the convicting evidence on the ground that no reasonable jury could have found that the defendant operated the vehicle fleeing from law enforcement officers. We disagree. The evidence adduced at trial provided ample support for the jury's finding that the defendant operated the black car and thus committed the offense of felony evasion. Mr. Fair testified that he saw the defendant enter a black car in the parking lot of The County Line. Although Ms. Norton was in the car's driver's seat at that time, when law enforcement officers observed the vehicle several minutes later, Deputies Beverly and Livingston testified that Ms. Norton was in the passenger's seat. Both deputies testified that Mr. Guerassio was in the back seat of the car. Deputy Beverly positively identified the defendant as the driver during his testimony. Although Deputy Livingston could not affirmatively identify the defendant as the driver, circumstantial evidence adequately established that the defendant operated the motor vehicle. Ms. Norton, during her arrest by Deputy Beverly, stated that nobody could stop the defendant. Further, testimony established that the black car eventually stopped at the defendant's father's house.

The defendant especially takes issue with Deputy Beverly's identification of the defendant. He argues that Deputy Beverly "stated that the view picked up by the video shown to the jury does not reflect exactly what he saw that night" and that he "wants the jury to believe what he says and not what he sees." We realize that "when a court's findings of fact are based solely on evidence that does not involve issues of credibility, such as the videotape evidence in this case, the rationale underlying a more deferential standard of review is not implicated." *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000). However, in the present case, we do not treat the videotape as the sole determinant in resolving the factual issue of the identity of the defendant. The jury's determinations apparently were not based solely upon the tape, and in this case, we recognize the possibility that the video recording did not accurately or fully depict what Deputy Beverly actually saw during the early morning of February 10, 2007. Further, defense counsel addressed this issue on cross-examination, and the jury apparently credited Deputy Beverly's testimony.

Because ample direct and circumstantial evidence regarding the identity of the defendant was provided to the jury, we will not disturb its verdict.

II. Jury Instructions

The defendant argues that the trial court erred by instructing the jury verbally of the lesser-included Class E felony evading arrest without reducing the same to writing in violation of Tennessee Rule of Criminal Procedure 30(c). Further, he argues that the trial court erred by "ordering the jury to begin deliberations prior to providing written instructions to the jury to use in the deliberation process." In his brief, the defendant asserts, "There is no way that the jury could have returned a fair and impartial verdict when it began the deliberation process without law in front

of it to reference . . . ." He further argues, "The jury could not possibly have fairly considered the lesser included Class E felony evading arrest charge during its initial deliberation because it did not have the law in front of it to compare and contrast the elements [with the Class D felony evading arrest]." We note, however, that the defendant does not challenge the content of any jury instruction, and his appeal only challenges the manner in which the instructions were imparted.

The State responds that the defendant waived his argument by failing to make a timely objection. In the alternative, the State argues that any error committed by the trial court in failing to provide written instructions was harmless.

Rule 30(c) provides, in relevant part,

> In the trial of all felonies . . . every word of the judge's instructions shall be reduced to writing before being given to the jury. The written charge shall be read to the jury and taken to the jury room by the jury when it retires to deliberate. The jury shall have possession of the written charge during its deliberations.

Tenn. R. Crim. P. 30(c). It is error for a trial court to "violate the requirements of [Rule 30(c)] in failing to submit 'every word' of his charge to the jury in written form." *State v. Gorman*, 628 S.W.2d 739, 739 (Tenn. 1982). However, even if the failure to submit an instruction in writing is error, it is cause for reversal only if it more probably than not affected the judgment. Tenn. R. App. P. 36(a); *Gorman*, 628 S.W.2d at 740.

First, we consider whether the defendant, in failing to make a contemporaneous objection to the jury charge at issue, waived his appeal of the issue. The State broadly misstates that "[f]ailure to raise an objection under Tenn. R. Crim. P. 30(c) at trial results in a waiver of such issue on appeal." A defendant complaining of an instruction being *omitted* must make a special request that the instruction be given or otherwise object to the omission. *See* Tenn. R. Crim. P. 30(a), (b); *State v. Cravens*, 764 S.W.2d 754, 757-58 (Tenn. 1989); *State v. Haynes*, 720 S.W.2d 76, 84-85 (Tenn. Crim. App. 1986); *Bolton v. State*, 591 S.W.2d 446, 448 (Tenn. Crim. App. 1979). However, when a defendant complains of an *incorrect* instruction, he may simply reserve the issue through a motion for new trial. *Haynes*, 720 S.W.2d at 84-85. In the instant case, the defendant does not challenge the omission of a jury charge. Although the lesser-included offense instruction was initially omitted, the omission was called to the attention of the trial court and was ultimately included. The defendant claims error in the trial court's method of providing written instructions to the jury; therefore, he did not waive the issue by failing to make a contemporaneous objection. Here the defendant challenged the jury instruction in a timely motion for new trial, and, on appeal, we will address this issue on the merits. *See State v. Thomas J. Faulkner, Jr.*, No. E2000-00309-CCA-R3-CD, slip op. at 14 (Tenn. Crim. App., Knoxville, Apr. 17, 2001) (issue not waived because, even though counsel did not object "on the basis that a written instruction should have been submitted," the issue was raised in defendant's motion for new trial).

The trial court, in its written order denying the defendant's motion for new trial, admitted its error "in failing to have the portion of its charge dealing with a lesser included offense

reduced to writing before charging the jury orally and in having the jury begin their deliberations prior to delivery of a copy of the written charge to them." However, the trial court determined such error was harmless for the following reasons,

> 1. The oral charge regarding a lesser included offense which was delivered by the [c]ourt prior to being reduced to writing was taken from the pattern jury instructions which are obviously in writing. The additional charge was typed up and inserted into the written charge which was eventually provided to the jury.
>
> 2. The complete written charge, including the additional charge on a lesser included offense, was provided to the jury shortly after their deliberations began.
>
> 3. The jury did not have any verdict forms until all of the verdict forms and the entire charge, in writing, was delivered to them shortly after their deliberations began.
>
> 4. Most importantly, the jury returned a verdict of guilty beyond a reasonable doubt as to the offense charged and never reached any lesser included offense in their deliberations. Accordingly, any error regarding instructions on a lesser included offense was of no consequence.

The defendant, in his brief, broadly asserts that the trial court's failure to strictly comply with Rule 30(c) created a situation where the jury could "not possibly" give fair consideration to the defendant.

However, the defendant does not make any specific argument as to how he was prejudiced by the trial court's slight derogation of Rule 30(c). We agree with the trial court that any error was harmless. The lesser-included Class E felony charge was contemporaneously given to the jury with the remainder of the otherwise unchallenged jury instructions. Although the jury did not have the benefit of "[t]he written charge" in the jury room when it first retired to deliberate pursuant to Rule 30(c), according to the record, the jury received complete written instructions shortly thereafter. The defendant has shown no prejudice in such a short delay in the jury's receiving written instructions. Also, the defendant's argument that the jury "could not possibly" have fairly considered the lesser-included offense by comparing and contrasting the Class D and Class E felony charges is factually inaccurate. The trial court stated on the record that the reason for its delay in delivering written jury instructions was to add the lesser-included Class E felony charge, and the trial court told the jury that it would only receive written instructions that were complete and included all lesser-included offenses. Lastly, we note that the trial court instructed to jury to use an "aquittal-first" approach to consider lesser-included offenses. It is apparent that the jury unanimously convicted the defendant of the Class D felony, thus, under the trial court's instructions, the jury would have never considered the lesser-included Class E felony instruction. The trial court's error, while possibly and technically in violation of Rule 30(c), was *de minimus* and did not prejudice the defendant.

III. Sentencing

The defendant lastly challenges the length of his sentence and the amount of his fines. He argues that the trial court "incorrectly appl[ied] the sentencing considerations under T.C.A. § 40-35-103 and T.C.A. § 40-35-210." The defendant argues that instead of ordering the maximum allowable sentence for a Class D felony of eight years' imprisonment, the court should have imposed the minimum four years' imprisonment. *See* T.C.A. § 40-35-112(b)(4) (2006) (setting the sentence range for a Class D felony conviction of a Range III offender as "not less than four (4) nor more than eight (8) years"). The defendant does not, however, challenge the trial court's decision to classify the defendant as a multiple, Range III offender.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the trial court's determinations are correct. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *Id.* "The burden of showing that the sentence is improper is upon the appellant." *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id.* If appellate review reflects that the trial court properly considered all relevant factors and if its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

A review of the sentencing hearing shows that the trial court, on the record, considered all mitigating and enhancing factors. *See* T.C.A. §§ 40-35-113, -114 (2006). The trial court reviewed the presentence report and determined that the defendant should be sentenced as a multiple offender. The trial court considered the defendant's four prior felony convictions. It further noted,

> I count eight convictions for resisting arrest and two prior misdemeanor evading arrests and either two or three domestic assaults, one misdemeanor and one felony escape, two violations of an order of protection, ten probation violations, . . . two misdemeanor vandalisms, an aggravated criminal trespass, driving on a suspended licence . . . misdemeanor theft . . . a misdemeanor assault and another misdemeanor theft and one failure to appear and another criminal trespass and a possession of a prohibited weapon.

The trial court noted the defendant's "complete lack of respect for the law" and his history of "fail[ing]" rehabilitative programs. Regarding the evading arrest conviction, the court reasoned "this type of continuing behavior is a danger to the public and the [c]ourt finds . . . confinement in this case . . . necessary to protect the public." The trial court found that no mitigating factors applied, and it sentenced the defendant to the maximum eight-year sentence for his evading arrest conviction, with the misdemeanor vandalism sentence running concurrently to the felony sentence.

The trial court acted within its discretion in sentencing the defendant. Defense counsel admitted during the sentencing hearing that "[b]ased upon the presentence report, I don't

think that there's a whole lot I can say to influence the [c]ourt." In light of our review of the defendant's extensive criminal history, which shows an inability to comply with the law and a tendency for violence, we will not disturb the trial court's decision to sentence the defendant to the maximum sentence available.

As for the fines imposed by the jury, the defendant argues that "[t]he trial court . . . erred by not considering [the defendant's] ability to pay in approving the fine[s] imposed by the jury." Appellate review clearly extends to the imposition of fines. *State v. Bryant*, 805 S.W.2d 762, 767 (Tenn. 1991). When an offense is punishable by a fine in excess of $50, it is the jury's responsibility to set a fine, if any, within the ranges provided by the legislature. *See* T.C.A. § 40-35-301(b) (2003). The trial court, in imposing the sentence, shall then impose a fine in an amount not to exceed the fine fixed by the jury. *See id.*

The trial court's imposition of a fine is to be based upon the factors provided by the 1989 Sentencing Act, which includes the defendant's ability to pay the fine. *See State v. Marshall*, 870 S.W.2d 532, 542 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Carter*, 988 S.W.2d 145, 149 (Tenn. 1999), *as recognized in State v. Smith*, 996 S.W.2d 845, 847-48 (Tenn. Crim. App. 1999). A defendant's ability to pay, however, is not the controlling factor. *State v. Butler*, 108 S.W.3d 845, 853 (Tenn. 2003). A fine, in other words, "is not automatically precluded because it works a substantial hardship on the defendant; it may be punitive in the same fashion incarceration may be punitive." *State v. Jimmy Wayne Perkey*, No. E2002-00772-CCA-R3-CD, slip op. at 5 (Tenn. Crim. App., Knoxville, Aug. 12, 2003), *perm. app. denied* (Tenn. 2003). Other relevant factors include prior history, potential for rehabilitation, and mitigating and enhancing factors that are relevant to an appropriate overall sentence. *See State v. Blevins*, 968 S.W.2d 888, 895 (Tenn. Crim. App. 1997). The seriousness of a conviction offense may also support a punitive fine. *See State v. Alvarado*, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996).

We find no objection by the defendant at the time of sentencing to the fine that the jury imposed and no proof or argument why the court should not approve the fine. In our estimation, the defendant has not shouldered his burden on appeal to show why the fine is excessive. *See Butler*, 108 S.W.3d at 852. The defendant's criminal history and the seriousness of the offense adequately support the punitive nature of the fine assessed.

IV. Conclusion

For the reasons stated above, we affirm the judgments of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE